ATTACHMENT F

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Superfund Cleanup Acceleration Act of 1998 Report of the Committee on Environment and Public Works United States Senate Together with Additional, Supplemental, and Minority Views to Accompany S. 8

SECTION 603. FULL COMPLIANCE BY FEDERAL ENTITIES AND FACILITIES

Summary

Section 603 waives sovereign immunity at Federal facilities, thereby allowing States that have enforcement and liability authority similar to CERCLA sections 106 and 107 to sue Federal agencies and to impose penalties. Expanding the language of CERCLA's current waiver of immunity in paragraph (1) of section 120(a), the bill's section 603(1) states that Federal agencies are subject to all other Federal, State, interstate, and local laws and requirements, both substantive and procedural, relating to a response action, a restoration action, or the management of a hazardous waste, pollutant, or contaminant. Under this provision, Federal agencies must comply with these laws and regulations in the same manner and to the same extent as any nongovernmental entity.

Discussion

This section explicitly reaffirms and expands the waiver of sovereign immunity in section 120 that was added to CERCLA by the 1986 Superfund amendments. Section 603 is modeled after language used in the Federal Facilities Compliance Act of 1992 and also employed in the Safe Drinking Water Amendments Act of 1995. The waiver subjects the Federal government to the full range of available enforcement tools, making it liable for penalties whether the violation of Federal, State, interstate, or local law is a single or repeated occurrence, and regardless of whether the penalty is punitive or coercive in nature. Nevertheless, the State must be evenhanded in its actions. The requirements of a State law may not be applied more stringently to the Federal government than to other persons. The reference to a `restoration action or the management of a hazardous waste' in paragraph (1)(B)(I) of new section 120(a) is intended to show that the waiver of immunity extends to the restoration of injured natural resources, and includes corrective actions under the hazardous waste management provisions of RCRA.

The section further provides that agents, employees, and officers of the United States shall not be personally subject to civil penalties for any acts or omissions within the scope of their duties. They are not immune from enforcement of injunctive relief or criminal sanctions.

The section also authorizes the Administrator to issue section 106 administrative orders to any Federal agency in the same manner and under the same circumstances as it would initiate such action against other parties. In the past, the Department of Justice has declined to bring actions against Federal agencies under the theory of the unitary executive. This provision allows the Administrator to enforce compliance. The other Federal agency is given an opportunity to be heard, and an administrative order would not become final until the agency has an opportunity to confer with the Administrator.

Any fines and penalties collected by a State from the Federal government are required to be used only for projects to improve or protect the environment or, more broadly, to defray the costs of environmental protection or enforcement unless the State's constitution or a State law in effect at the time of the bill's enactment requires a different use of the funds.

The existence of an interagency agreement between EPA and a Federal agency shall not impair or diminish the enforceability of a Federal or State law unless the requirements of the law were specifically addressed in the interagency agreement or were specifically waived.

DOD 'strongly opposed' section 603 of the bill on several grounds. The DOD argued that the existing waiver of sovereign immunity was already total, and that all provisions of CERCLA already apply to Federal agencies. DOD maintains that any friction with the States occurs when the States insist on following their own cleanup process rather than CERCLA's. DOD already complies with substantive State standards through the use of ARARs under section 122(d). DOD maintains that requiring it to comply with a patchwork of State processes would slow its cleanups. DOD is especially concerned about the disruption that could result when a State's demands for response activities necessitates a reordering of DOD's risk-based priorities, and causes financial impacts exceeding DOD's appropriation, possibly affecting its other missions. During markup, these issues were discussed, as was the importance of protecting public health and the environment. It was ultimately determined that the President's authority under CERCLA section 120(j) to issue orders regarding response actions at a specified site or DOE or DOD facility was sufficient to protect the national security interests of the United States.